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In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD G. DAIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The question presented by the petition is whether the court of appeals correctly held that petitioner's federal income tax liabilities for 1969 through 1971 were not discharged in bankruptcy, because assessment of the taxes was prohibited prior to bankruptcy pending the exhaustion of petitioner's administrative and judicial remedies within the meaning of Section 17a(1)(c) of the Bankruptcy Act, 11 U.S.C. 35(a)(1)(c).

The pertinent facts may be summarized as follows: On August 17, 1973, following an audit of petition-

er's income tax return for 1969, the Internal Revenue Service mailed a 30-day letter to petitioner and his wife containing proposed adjustments, and stating that if they agreed with the proposed adjustments they should sign the agreement form and pay the tax due, but that if they disagreed, they could request a conference to settle the dispute. The letter further stated that, in the absence of further advice from petitioner within 30 days, the case would be processed on the basis of the proposed adjustments (App. 50).[1] Three days later, on August 20, 1973, petitioner's counsel sent a letter to the Internal Revenue Service stating that he was concerned with all of petitioner's prior liabilities, that petitioner was not in a position to pay large sums at one time, and that petitioner would like to attempt a settlement, if a settlement were feasible (App. 56-57). Thereafter, following a conversation between petitioner's counsel and a member of the review staff of the District Director's office, petitioner submitted offers in compromise of his 1969 through 1971 liabilities (App. 59-62). Subsequently, on May 21, 1975, petitioner submitted new offers in compromise with respect to those taxable years, increasing the amounts offered (App. 63-66). In this connection, he executed waivers of the limitations period (*ibid.*). On September 16, 1975, the Internal Revenue Service rejected the offers (Pet. App. 29). Approximately two months later, on November 10, 1975, petitioner filed a voluntary petition in bankruptcy. On March 15, 1976, he was granted a discharge, and on August 17, 1976, the bankruptcy case was closed as a "no assets" case (Pet. App. 29).[2]

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[1] "App." refers to the joint appendix filed in the court below.

[2] On March 23, 1976, the Internal Revenue Service assessed income taxes in the total amount of $49,257.74, plus interest,

Petitioner thereafter requested the bankruptcy court to reopen the case and determine the dischargeability of his income tax liabilities for 1969 through 1971 (Pet. App. 30). Petitioner filed a motion for summary judgment asserting that the taxes were dischargeable, and the government filed a cross-motion for partial summary judgment asserting that the taxes were nondischargeable under Section 17a(1)(c) and (d) of the Bankruptcy Act (Pet. App. 31). The bankruptcy court rejected the government's reliance on Section 17a(1)(c) and held that a trial would be required to determine whether the taxes were nondischargeable under Section 17a(1)(d) (Pet. App. 32). The district court affirmed (Pet. App. 33).

The court of appeals reversed in favor of the government. It held that petitioner's tax liabilities were not discharged in the bankruptcy because the assessment of the liabilities had been prohibited prior to bankruptcy within the meaning of Section 17a(1)(c) of the Bankruptcy Act (Pet. App. 36-47).

1. The decision below correctly held that petitioner's tax liabilities were not discharged in bankruptcy. Section 17a(1)(c) of the Bankruptcy Act renders nondischargeable taxes "not reported on a return * * * and * * * not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt."[3] Petitioner conceded in

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and the government filed its proof of claim in the bankruptcy proceedings on April 13, 1976 (Pet. App. 30; App. 80-81).

[3] The new Bankruptcy Code does not incorporate the terms of Section 17a(1)(c). Instead, in order to cure abuses by taxpayers that had developed under that provision, Congress enacted two provisions (11 U.S.C. (Supp. III) 507(a)(6)(A) and 523(a)(1)(A)), which generally bar a discharge where

the court below (Pet. App. 35) that the taxes involved here were not reported on a return. Nor can there be any serious question that in submitting the offers in compromise, petitioner invoked his administrative remedies. See *In re Indian Lake Estates, Inc.*, 428 F.2d 319, 324 (5th Cir.), cert. denied, 400 U.S. 964 (1970); *In re Greve*, 39 A.F.T.R.2d 77-525 (W.D. Okla. Dec. 6, 1976); *Ine re Ferwerda*, 36 A.F.T.R.2d 75-5413 (E.D. Wisc. June 23, 1975; *In re Laytan Jewelers, Inc.*, 332 F. Supp. 1153, 1166 (S.D.N.Y. 1971).[4]

Petitioner argues (Pet. 6-8) that prior to bankruptcy, assessment of the taxes was not prohibited within the meaning of Section 17a(1)(c). It is true, as the court of appeals pointed out (Pet. App. 37-38), that the Internal Revenue Service has the power to make jeopardy assessments pursuant to Sections 6851 and 6861 of the Internal Revenue Code of 1954

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the assessment is within the limitations period and afford the Internal Revenue Service additional periods for assessing taxes where the bankrupt has invoked judicial and administrative remedies. See generally 3 *Collier on Bankruptcy* ¶ 523.06[2][a], at 523-19 (15th ed. 1981).

[4] In this regard, petitioner states (Pet. 8) that, because his offers were based on inability to pay, he should not be regarded as invoking his administrative remedies when he submitted the offers. Petitioner bases this argument (Pet. 17-18) on Section 301.7122-1(d)(2) of the Treasury Regulations on Procedure and Administration (26 C.F.R.). That provision indicates that the submission of an offer in compromise does not automatically stay the collection of tax liabilities. The Regulation therefore concerns the situation in which taxes have been assessed, not a situation in which no notice of deficiency has been issued and no assessment has been made. Here, on the other hand, the Service prior to bankruptcy issued no notice of deficiency to petitioner and accordingly made no assessment of the taxes at issue.

(26 U.S.C.). But in holding that the Internal Revenue Service was prohibited from making an assessment of the liabilities prior to bankruptcy, the court of appeals followed a consistent line of authority that the prohibition to which Section 17a(1)(c) refers is the prohibition contained in Section 6213(a) of the Internal Revenue Code of 1954 (26 U.S.C.). See *In re Indian Lake Estates, Inc., supra*, 428 F.2d at 323-324; *In re Greve, supra*, 39 A.F.T.R.2d at 77-530; *In re Laytan Jewelers, Inc., supra*, 332 F. Supp. at 1165-1166; see also *In re Michaud*, 458 F.2d 953, 958-959 n.17 (3d Cir.), cert. denied, 409 U.S. 876 (1972); 1A *Collier on Bankruptcy* ¶ 17.14[4], at 1620-1621 (14th ed. 1978). Section 6213(a) prohibits assessment until after a notice of deficiency has been issued and the 90-day period for filing a petition in the Tax Court has expired or, if a petition is filed, the decision of the Tax Court becomes final.[5] This interpretation of Section 17a(1)(c) is correct because it enables potential bankrupts to utilize administrative and judicial remedies. As the Third Circuit pointed in *In re*

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[5] Petitioner cites (Pet. 9) 1A *Collier on Bankruptcy* ¶ 17.14[4] (14th ed. 1978), as support for his position that the taxes could have been assessed prior to bankruptcy. As the court of appeals pointed out (Pet. App. 39-40), however, even if petitioner's interpretation of the statement in paragraph 17.14[4] were correct, it would not support his position in this case because the negotiations were not concluded until September 16, 1975, when the offers were rejected, and the petition in bankruptcy was filed 55 days later. Thus, contrary to petitioner's contention, even if the notice of deficiency had been issued immediately after the offers were rejected, the 90-day period for filing a petition in the Tax Court would not have expired prior to bankruptcy.

Michaud, supra, 458 F.2d at 958-959 n.17, a contrary rule might well precipitate unnecessary bankruptcies.[6]

Contrary to the implication of petitioner's argument, it was his actions that caused the delay in making the assessment of the taxes at issue here. He submitted offers in compromise, rather than permit the taxes to be assessed in accordance with the proposed adjustments. Moreover, even after his submission of the offers, it was open to petitioner to withdraw them and thereby conclude the administrative process so that the taxes could be assessed. Instead, upon the rejection of his first offers, he submitted additional offers and executed waivers of the period of limitations on assessment and collection. Petitioner chose to pursue his administrative remedies. The court of appeals therefore correctly concluded that his tax liabilities were not discharged in bankruptcy under Section 17a(1)(c) of the Bankruptcy Act.

2. Petitioner also argues (Pet. 23) that the term "bankruptcy," as it is used in Section 17a(1)(c), should be interpreted to mean a discharge in bankruptcy.[7] But, as the court of appeals correctly pointed

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[6] In order to avoid a potential discharge, the Secretary of the Treasury would be prompted to make a jeopardy assessment cutting short settlement negotiations in any case in which he believed the taxpayer was likely to file a petition in bankruptcy. See *In re Michaud, supra*, 458 F.2d at 958 n.17.

[7] Section 6871 of the Internal Revenue Code of 1954 (26 U.S.C.), which petitioner cites (Pet. 22-24), has no bearing here since that Section concerns assessment of taxes after a petition in bankruptcy is filed. The issue here turns on whether assessment of the taxes was prohibited prior to bankruptcy.

out (Pet. App. 36-37 & n.5), the term bankruptcy is defined by Section 1(13) of the Bankruptcy Act, 11 U.S.C. 1(13), to mean the date on which the petition in bankruptcy was filed. That term is given a consistent meaning throughout the Bankruptcy Act to assure certainty with respect to the computation of time limits. 1 *Collier on Bankruptcy* ¶ 1.13, at 86 (14th ed. 1974). Accordingly, petitioner's assertion that the taxes could have been assessed prior to his discharge is irrelevant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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